



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Application of Pesticides to Waters of the United States

FROM: Sylvia K. Lowrance
Acting Assistant Administrator

TO: Regional Administrators, Regions I - X

This memorandum is to inform you of a recent decision of the Ninth Circuit regarding the direct application of an aquatic herbicide to irrigation canals that were found to be waters of the United States and to alert you to the Environmental Protection Agency's ("EPA") current position on our civil enforcement response to that case. Under the conditions specified below, civil water enforcement priorities should not change and enforcement against any direct application of pesticides to waters of the United States in accordance with a Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") label, will be a low enforcement priority until EPA develops a concerted national approach on how to best regulate those activities.

In *Headwaters v. Talent Irrigation District*, 243 F.3d 536 (9th Cir., March 12, 2001), the Court held that a National Pollutant Discharge Elimination System ("NPDES") permit was required for the direct application of an aquatic herbicide to water because the residual herbicide in the water following the application was found to be a pollutant. In that case, a pesticide applicator had applied Magnacide H to irrigation canals that were waters of the United States without first obtaining an NPDES permit. The Court considered the boundary between the Clean Water Act ("CWA") and the FIFRA and concluded that the direct application of Magnacide H through a point source to waters of the United States in accordance with the pesticide's label requirements did not obviate the need for the applicator to obtain an NPDES permit.

The issue of how CWA requirements are met for the direct application of aquatic herbicides and other pesticides to water has important national implications for EPA, States, and the regulated community. For example, aquatic herbicides have long been considered to be essential tools for keeping irrigation canals free from aquatic vegetation which can impede flow by clogging irrigation channels and irrigation structures. EPA has not previously issued any national guidance of general applicability that would say that an NPDES permit would apply for these activities, nor have we established national policy specifying how the CWA might apply to the use of aquatic pesticides. Given the above, we understand that the decision in *Talent* could cause confusion among all interested parties.

EPA is initiating a process to determine how best to implement the CWA and FIFRA with respect to the direct application of pesticides to waters of the United States. However, it is unlikely to complete that action during the ongoing season for applying aquatic herbicides to irrigation canals, which may constitute waters of the United States. In addition, the application season for public health pesticides used to control disease vectors, such as insecticides for mosquitos bearing infectious diseases, has begun. These important activities require an interim Agency response.

The FIFRA regulatory system requires that the Agency look carefully at the risks and benefits, including aquatic toxicology, when registering pesticides for aquatic application. That review gives considerable assurance that a registered pesticide product lawfully used will not cause unreasonable adverse effects on the environment. Accordingly, rather than disrupt activities such as keeping irrigation canals free from aquatic vegetation or protecting human health from disease, EPA has decided to maintain its existing high priority areas for water enforcement. Therefore, civil administrative or judicial enforcement against discharges from the application of aquatic pesticides will be a low priority provided that both of the following conditions are met:

- (1) The registered pesticide product is applied directly to waters of the United States in a manner consistent with its labeling; and
- (2) There are no egregious circumstances, such as those resulting in serious actual harm or which may present an imminent and substantial endangerment to public health or the environment.

This low priority does not apply to situations where pesticides enter waters of the United States through other pathways, such as storm water run off, industrial wastewater (including discharges from pesticide manufacturers and formulators), or discharges resulting from the improper management or disposal of pesticides.

In order to provide EPA adequate time to address this issue and to determine how best to regulate these activities, this prioritization will remain in effect through December 2001. We will review the Agency's and States' responses at that time and determine whether to continue this prioritization.

If you have any questions about this matter, please contact Eric Schaeffer, Director of the Office of Regulatory Enforcement, Brian Maas, Director of the Water Enforcement Division or Pamela Mazakas of their staff at (202) 564-4028.

cc: Diane C. Regas, Acting Assistant Administrator, Office of Water
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